Re: Review request outcome - 2021-104592

From [redacted]

To carmen.miragaya@ombudsman.gov.au

CC iain.anderson@ombudsman.gov.au, Emma Cotterill<Emma.Cotterill@ombudsman.gov.au>, david.fintan@ombudsman.gov.au, penny.mckay@ombudsman.gov.au, Ombudsman<Ombudsman@ombudsman.gov.au>, PID<PID@ombudsman.gov.au>

[redacted]

Date Friday, May 5th, 2023 [redacted]

Ms Miragaya

[1] I refer to your letter of decision dated 5 May 2021 (**Review request outcome – 2021-104592**).

[2] In *Review request outcome – 2021-104592* you state:

> As was explained to you at the outset and during our investigation, it is not the role of this Office, when investigating an agency's handling of a PID, to reinvestigate the PID. That is, we do not stand in the shoes of the investigator and assess the evidence afresh. Instead, the PID handling investigation considers whether the conduct of the PID investigation was reasonable and in accordance with the requirements of the PID Act and Standard, and whether the findings can be reasonably supported by the material obtained during the PID investigation. This approach is consistent with the intent of the PID Act as evidenced by the notes that appear under sections 42, 46 and 58 of that Act. **We disagree that our role extends to reinvestigation of disclosable conduct contained in public interest disclosures allocated to agencies for investigation.**

[3] In my email of 10 March 2022, I stated the following at [138] – [139]:

> In his record of decision, Mr Anstey states:
>
> > Our investigation is also not a reinvestigation of your disclosure. Rather, our investigation of a complaint of this kind focuses on the actions the agency took to investigate and finalise a PID, and whether those actions met the requirements of the PID Act and the Public Interest Disclosure

> Standard 2013 (PID Standard).

That is one of the only statements, if not the only statement, in his letter of decision that is correct.

[4] Plainly, you have not engaged with my review request because if you had, you would be compelled to acknowledge that I explicitly acknowledged that Mr Anstey's role as an investigator, under the *Ombudsman Act 1976* (Cth), was ***not*** to reinvestigate the disclosure. Rather, Mr Anstey's role was to investigate whether Ms McMullan's public interest disclosure investigation was lawful and reasonable in all the circumstances.

[5] You have not identified any passage in my request for review, or any other correspondence, in which I asserted that the role of an official in the Office of the Commonwealth Ombudsman "extends to reinvestigation of disclosable conduct contained in public interest disclosures allocated to agencies for investigation." I have explicitly acknowledged the contrary. I ***resent*** the fact that you would, without a skerrick of evidence, attribute to me a claim that I have never made, and, on that basis, tell me that I have "misunderstood the [Mr Anstey's] investigation and [Mr Anstey's] role." I am a very fine lawyer and I have misunderstood nothing of the sort.

[6] In *Review request outcome – 2021-104592* you state:

> Most of the reasons you identified for seeking review of Mark's decision relate to your belief that he would have reached different conclusions about the adequacy of the investigation if he had evaluated the evidence – that is, put himself in the shoes of the PID investigator and assessed each piece of evidence. As outlined above, this misunderstands the scope of our investigation and our role.

[7] Your claims are false.

[8] I was not labouring under the false belief that Mark Anstey's role was to "put himself in the shoes of the PID investigator" to assess each piece of evidence ***with a view to conducting a de novo review of Kate McMullan's public interest disclosure investigation***. Mark Anstey's role was, to adopt your choice of language, consider "whether the conduct of the PID investigation was reasonable and in accordance with the requirements of the PID Act and Standard, and whether the findings can be reasonably supported by the material obtained during the PID investigation."

[9] In other words, in respect of the evidence that was available to Ms McMullan, part of Mark Anstey's role as the official conducting an investigation under the *Ombudsman Act 1976* (Cth) was to assess the items of evidence ***to determine that they were logically probative of, and relevant to, the findings of fact made by Kate McMullan*** because Kate McMullan had statutory obligations to:

> a) "ensure that a finding of fact is based on logically probative evidence": *Public Interest Disclosure Standard 2013* (Cth), s 12(1); and
>
> b) "ensure that the evidence relied on in an investigation is relevant": *Public Interest Disclosure Standard 2013* (Cth), s 12(1).

[10] The fact that you have identified Mark Anstey's legitimate role (i.e. to consider "whether the conduct of the PID investigation was reasonable and in accordance with the requirements of the PID Act and Standard, and whether the findings can be reasonably supported by the material obtained during the PID investigation") with the false claim that Mark Anstey's role was to "put himself in the shoes of the PID investigator" to, ultimately, assess each piece of evidence ***with a view to conducting some kind of de novo review of Kate McMullan's public interest disclosure investigation*** demonstrates that you have misunderstood Mr Anstey's role.

[11] The fact that you would misattribute your erroneous views to me (i.e. that I was labouring under the false belief that Mark Anstey's role was put himself in the shoes of the PID investigator and assessed each piece of evidence ***with a view to conducting some kind of de novo review of Kate McMullan's public interest disclosure investigation***)also demonstrates just how unscrupulous a human being you are. I ***resent*** being told that I am labouring under a false belief when the fact is that I am labouring under no such false belief or misapprehension.

[12] In *Review request outcome – 2021-104592*you state:

> During a PID handling investigation, we may seek further information or make further inquiries of an investigating agency to help us determine questions we have about the conduct of an investigation or its findings. An obligation of procedural fairness arises in relation to the agencies we investigate if we propose to make comments that are expressly or impliedly critical of an agency. **I do not agree that receiving this further information gives rise to an obligation to afford you procedural fairness**.

[13] At no point in my request for review did I state that "receiving … further information [from an agency] gives rise to an obligation to afford [me with] procedural fairness." If you had taken the time to engage with my request for review, you will have noticed that what I stated was that the implied condition of procedural fairness (identified by the High Court in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*(2006) 228 CLR 152 and *Minister for Immigration and Border Protection v SZSSJ*(2016) 259 CLR 180) was breached because Mark Anstey constrained my opportunity to propound a case against the exercise of the power under section 12 of the *Ombudsman Act 1976* (Cth) in a way that was not prejudicial to my rights and interests in having the disclosable conduct that I reported in a public interest disclosure being "properly investigated and dealt with", as required by section 6(d) the *Public Interest Disclosure Act 2013* (Cth): see [66] – [83] of my email of 10 March 2023. In the light of the identified High Court authorities, the obligation arose because Mark Anstey based his decision to abort his investigation under the *Ombudsman Act 1976* (Cth) on advice that he secretly solicited from the agency he was investigating, which advice, as I noted in [65] of me email of 10 March 2023, was irrelevant to the question at hand.

[14] I also note the following.

[15] First, what you have done is attribute to me a claim that I did not make and, on the basis of this false attribution, claimed that you do not agree with this claim that "receiving … further information [from an agency] gives rise to an obligation to afford [me with] procedural fairness." This is nothing more than a classical *straw man fallacy*.

[16] Second, you have misattributed a statement to me to justify your decision to refuse to review Mr Anstey's decision, which demonstrates just how unscrupulous a human being you are. I ***resent*** being told, implicitly, that I claimed that merely receiving further information from the Australian Public Service Commission gave rise to an obligation to afford me with procedural fairness.

[17] Third, while I set out, by reference to High Court and Federal Court authorities, why it was that Mark Anstey had a legal obligation to provide me with procedural fairness, all you have done is proffer the bald assertion that you disagree with a claim that I never made. An assertion unsupported by reasons is ***the*** hallmark of crappy administrative decision making. The fact that your assertion is fallacious only magnifies the crappiness of your decision making.

[18] In *Review request outcome – 2021-104592*you state:

It is not unreasonable for an investigator to consider the Office's inability to direct an agency to take a particular course of action or to achieve a practical outcome for a complainant in determining whether further commitment to a particular investigation is warranted. **That the investigator came to a different conclusion about what action was warranted in response to the deficiencies they identified in the PID investigation does not, of itself, mean that the investigator's decision was wrong**. I note that the investigation identified deficiencies in the PID investigation that corresponded with some of the issues within your complaint and we advised you that we would bring those deficiencies to the attention of the agency and provide it with comments and suggestions for improvement.

[19] Once again, you have lapsed into a fallacy. Had Mark Anstey not lapsed into a jurisdictional error, or errors of law, or errors of fact, then, as you say, the mere fact that Mr Anstey, in his discretion, "came to a different conclusion about what action was warranted in response to the deficiencies they identified in the PID investigation [would] not, of itself, mean that the investigator's decision was wrong." But that is not what happened because Mark Anstey:

a) lapsed into a jurisdictional error by failing to afford me with procedural fairness (as to which, please refer to Part VI of my email of 10 March 2022); and

b) made errors of law (e.g. as noted in Part IV of my email of 10 March 2023, Mark Anstey claimed that the Office of the Commonwealth Ombudsman "cannot take any action that would cause an agency to reinvestigate a PID ... because the PID Act does not provide a mechanism for a finalised PID investigation to be reopened", even though that statement of (so-called) law flatly contradicts Chief Justice Gleeson's judgment in *Minister for Immigration and Multicultural Affairs v Bhardwaj*(2002) 209 CLR 597); and

c) made errors of fact (e.g. Mark Anstey claimed, in the context of "role reviews" of the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – QLD role, and the Senior Executive Band 1 classified National Judicial Registrar & District Registrar – WA role, and the Senior Executive Band 1 classified National Judicial Registrar role, that there was logically probative and relevant evidence that the "Agency Head had decided it was appropriate and necessary for some positions to be held at EL2 level ***and this decision was documented***", even though FOI decision makers in the Federal Court of Australia have conceded that no such documentary evidence exists, and even though the General Counsel of the Australian Publiuc Service Commission has conceded that the document on which Kate McMullan relied (Judicial Registrar Outcome document – Annexure EDR - 93) is not a role review document).

[20] Mischaracterising the issue before you as one relating to an exercise of a discretionary power, ***unaffected by errors of law and fact***, on Mark Anstey's part demonstrates just how unscrupulous a human being you are.

[21] Do you know why I am confident that, between us, I am the superior lawyer? Aside from the facts that:

a) almost all of what I put forward is supported by reference to statutory provisions and/or authoritative judgments; and

b) all of what I put forward is logically valid and coherent; and

c) all of what I put forward is factually accurate,

it only took me all of 26 minutes and 38 seconds to read your trashy decision letter and respond to it with this email. Forget the same ballpark. You're not even in the same league as I am.

[22] As you know, neither your reasons for decision nor Mark Anstey's reasons for decision are subject to any kind of non-disclosure obligation on my part. They will be shared with others.

[23] Separately, you have failed to acknowledge receipt of my request for correspondence sent to me from officials in the Office of the Commonwealth Ombudsman in relation to 2021-104592. That email was sent to you on 25 April 2023. My request was, pursuant to the policy of the Office of the Commonwealth Ombudsman to share correspondence with complainants, for access to the notice that Mark Anstey sent to me, setting out the material information that he used to make a decision adverse to my legal interests (i.e. notice that he had solicited advice from the agency he was investigating and that he proposed to (uncritically) adopt that advice to support his decision to abort the investigation Penny McKay ordered on 18 March 2022, and thus affect my legal interests, as articulated in the objects of the *Public Interest Disclosure Act 2013* (Cth), in the proper investigation of the disclosure that I submitted under the *Public Interest Disclosure Act 2013* (Cth)). Please provide a response to that lawful and reasonable request, as well as the document requested (should it exist).

Yours faithfully

Discloser

------- Original Message -------
On Friday, May 5th, 2023, PID <PID@ombudsman.gov.au> wrote:

> Dear Discloser
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> Thank you for your review request of 23 March 2023. I apologise that my consideration of your request has taken more than 30 days and I thank you for your patience. A letter explaining the outcome of your request is attached.
>
> Yours sincerely
>
> **Carmen**
>
> Director, Public Interest Disclosure team
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